

September 21, 2012

Randall J. Meyer, Inspector General
Rhodes State Office Tower
30 East Broad Street – Suite 2940
Columbus, OH 43215-3414

Dear Mr. Meyer:

On August 2, 2012, the offices of Columbus City Attorney Richard C. Pfeiffer Jr. and Franklin County Prosecutor Ronald J. O'Brien were provided with courtesy copies of the Report of Investigation from the Office of the Inspector General dated August 2, 2012, pertaining to various alleged acts of wrongdoing and/or omissions purported to have been committed by Stan Heffner, then Superintendant for Public Instruction for the Ohio Department of Education ("ODE"). This report did not contain a referral for prosecution. Nonetheless, we - Assistant County Prosecutor Jeff Blake and Chief City Prosecutor Lara Baker -- have reviewed the evidence gathered in light of the prohibitions contained within the Ohio Ethics Laws as well as the Theft in Office statute.

We were greatly troubled by the allegations contained within this report. First, it is alleged that Mr. Heffner, in his role as Interim Superintendant, testified before the Ohio Senate Finance committee in support of a bill that had the potential to result in great financial gain for the company from which Mr. Heffner had accepted an offer of employment. Second, it is alleged that Mr. Heffner used the services of the administrative assistants who were subordinate to him (as well as state-owned resources provided to him and his assistants) to perform personal tasks related to Heffner's job search and subsequent planned move to San Antonio, TX. Despite our belief that Mr. Heffner acted inappropriately in both instances, we are compelled by our review of the evidence gathered, in light of the elements of the offenses, to agree with your decision not to refer this matter for prosecution as we too do not find that the evidence supports probable cause to file criminal charges. As a result, we are unable to pursue a criminal prosecution.

Evidence Presented

In making a probable cause determination, we reviewed the Report of Investigation provided to us by the Office of the Inspector General. In addition, we received supplemental documentation (emails, calendars, etc.) and transcriptions of the various interviews conducted during the course of the investigation. We personally met with representatives of both your office as well as the Ohio Ethics Commission. We have also reviewed Opinions of the Ohio Ethics Commission, the various statutes involved, copies of the written testimony provided by Mr. Heffner to the General Assembly at various points throughout the last year, and other related written materials.

Review of Allegations – Probable Cause Evaluation

In determining whether the conduct of Stan Heffner in his employment with ODE arises to the level of a criminal violation we considered his behavior in light of the following misdemeanor statutes: ORC §102.03(A)(1) – Revolving Door; ORC §102.03(D)– Conflict of Interest; and ORC§2921.43 – Improper Compensation. We also reviewed Mr. Heffner’s conduct in light of the felony violations of Theft in Office wherein the underlying offenses considered were Unauthorized Use of Property and Petty Theft. In each instance, there is no dispute that at all relevant times, Stan Heffner was employed by ODE, a “public agency,” such as to bring his conduct within the purview of the Ohio Ethics Laws and that the resources used for his personal tasks were owned by the State of Ohio.

○ Revolving Door – Testifying before the Ohio Senate Finance Committee on HB 153

The Revolving Door statute prohibits a public official or employee from recklessly, during the course of the employee’s employment, acting in a representative capacity (representation being either formal or informal) on behalf of any person (including a company) on any “matter” in which the employee personally participated as employee through “...recommendation... or other substantial exercise of administrative discretion.” ORC 102.03(A)(1).

On May 11, 2011, Mr. Heffner, in his capacity at the time as Interim Superintendant of Public Instruction, gave testimony in support of Sub. HB 153 before the Ohio Senate Finance Committee. HB 153 was an omnibus budget bill which contained provisions specific to the Ohio Department of Education including, relevant to this investigation, the proposed enactment of a statute requiring that teachers teaching in low-performing schools be re-tested in their core subject fields. At the time that Mr. Heffner testified before the committee, Mr. Heffner had accepted an offer of employment with ETS – Educational Testing Services – the company that administers the Praxis II test which is currently used in Ohio for teacher licensing. While Mr. Heffner’s specific position within ETS did not involve the Praxis II, the legislative amendments proposed in HB 153 could have resulted in an increase in the use of Praxis II testing and, thus, potential financial gain for ETS. At the time of his testimony before the Senate Finance Committee, the evidence gathered shows the Ohio Board of Education was aware of Mr. Heffner’s future employment with ETS, and ETS had gone so far as to have issued a press release announcing Mr. Heffner’s future employment.

Applying the facts gathered during the course of the investigation to the elements of the offense, it is clear that probable cause to believe that a violation occurred is lacking. First, there is scant evidence to demonstrate that Mr. Heffner was acting “in a representative capacity” on behalf of ETS when he testified before the

Senate Finance Committee. While he had accepted a job offer from the company and while it certainly would have been more appropriate for Mr. Heffner to have affirmatively disclosed said fact before the committee, the fact of the existence of the offer was not a secret – it was well-known to Heffner’s Board and to the public at large. In this sense, there are no facts to support an assertion that Heffner had, in any way, been secretly obtained by ETS to give the testimony in question.

Second, there is question as to whether the testimony given as relates to teacher re-testing even constitutes an actual recommendation of the statutory provision. Heffner’s testimony on the matter was limited to the following one paragraph from a five and a half page document:

“New programs in HB 153 are geared toward attracting, rewarding and promoting good teaching, including the Teacher Incentive Payment Program, performance-based compensation requirements, revisions to the process for alternative licensure, and retesting teachers working in the schools at the bottom 10% of performance index scores. We believe many of these provisions can complement the activities of RttT already underway.”

While the testimony certainly did not argue against teacher re-testing, it also did not specifically call for the provision to be adopted – all the testimony did was acknowledge that the provision existed and state that, if passed, it would complement existing programs.

Third, even if the issues relating to representation and recommendation could be overcome, the fact that Heffner’s testimony on this matter was before a legislative body makes ORC 102.03(A)(1) inapplicable. By definition, “any matter,” as stated in the statute, is defined as “..any case, proceeding, application, determination, issue or question, but does not include the proposal, consideration, or enactment of statutes...” ORC 102.03(A)(5). Probable cause does not exist to support a finding of a violation of ORC 102.03(A)(1).

○ **Conflict of Interest - Testifying before the Ohio Senate Finance Committee on HB 153**

The Conflict of Interest statute prohibits a public official or employee from recklessly using the “authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person’s duties.” ORC 102.03(D). Opinions of the Ohio Ethics Commission support the interpretation that the thing of value sought need not be for the personal benefit of the public official/employee and, in fact, where the employee has a promise of future employment with another company, actions on the part of the employee to obtain

things of value that will result in financial gain for that future employer are prohibited by this statute. See Advisory Opinion Nos. 89-0006; 87-0004.

Clearly if Mr. Heffner had recommended, in his position as Superintendent and while holding an offer of employment from ETS, to the State Board of Education that they select ETS as the approved provider of the re-testing services referenced in newly enacted ORC 3319.58, Mr. Heffner would be in violation of ORC 102.03(D). However, that is not what occurred in this instance. First, as stated above, it is not clear that Heffner was actually advocating or recommending the provision in question. Second, even if Heffner was so advocating, the legislation itself does not mandate that any particular testing company be used. The statute states:

“Each year, the board of education of each city....with a building ranked in the lowest ten per cent of all public school buildings...shall require each classroom teacher in a core subject area in such a building to register for and take all written examinations prescribed by the state board of education for licensure to teach that core subject area and the grade level to which the teacher is assigned...”

ORC 3319.58(B). The statute clearly recognizes that the state board of education (and not the Superintendent of Public Instruction) has the discretion to determine which written examinations will be prescribed for teacher licensure. While ETS's Praxis II is currently used in the state of Ohio for such purpose, there is no requirement in ORC 3319.58 that ETS be retained for such use. In fact, the decision over which examinations are to be used is required to be reviewed by the state board of education at least once every five years:

The Ohio department of education shall continuously monitor administration of the examinations and shall evaluate the effectiveness of each examination at least once every five years according to the criteria set forth in paragraph (B) of this rule in collaboration with the Ohio educator standards board. The results of the evaluation shall be reviewed by the Ohio educator standards board and the Ohio department of education in order to determine recommendations for possible revision of examination requirements.

OAC 3301-26-01(C). Admittedly, testifying before the Senate Finance Committee without formally disclosing his relationship with ETS to the Committee was ethically questionable, but given the tenuous connection between enactment of the statute and financial gain to ETS at the time of the testimony, it cannot be said that Heffner secured a thing of value or secured a promise of a thing of value or secured even an offer of a thing of value for ETS and, as such, there is no probable cause to believe that a violation of ORC 102.03(D) occurred.

- **Conflict of Interest – Causing another state employee to work on Heffner's personal matters on state time.**

In addition to the allegations relating to Heffner's testimony before the Senate Finance Committee, the investigation also uncovered several instances of Heffner's use of state resources for personal matters. For the most part, allegations of this nature are analyzed in terms of the felony theft in office statutes, but in this instance Heffner also caused another state employee to use state resources to do personal work for him on state time, raising the question of a misdemeanor violation of Conflict of Interest under ORC 102.03(D). It is clear from the evidence gathered that the work performed by Heffner's administrative assistants in furtherance of his job search and planned move to San Antonio were done at Heffner's behest. As their direct supervisor, Heffner used the authority of his office/employment to obtain a thing of value – the value of their personal secretarial services - to perform a function that he would otherwise have to pay another to do or do himself.

However, to prove a violation of the Conflict of Interest statute, it would also have to be demonstrated that the thing of value was of such a character as to manifest a substantial and improper influence upon Heffner in the performance of his duties. The evidence gathered in this investigation fails to support such a finding as there is no demonstrated conflict of interest between the administrative assistants (the source of the thing of value) and Heffner's work for the ODE. In fact, the evidence suggests that the assistants' work was done in hopes of assuring that the calendaring of Heffner's personal matters did not conflict with his job schedule. While Heffner's use of state employees for the scheduling of his private appointments and travel arrangements was certainly inappropriate, the behavior does not fall within the prohibitions contained within ORC 102.03(D) as written.

- **Improper Compensation – Causing another state employee to work on Heffner's personal matters on state time.**

Finally, the use of a state employee to perform personal tasks may also constitute a violation of ORC §2921.43 – Improper Compensation. That statute reads, in pertinent part:

No public servant for the public servant's own personal or business use...shall solicit or accept anything of value in consideration of either of the following:

(2) Preferring, or maintaining the status of, any public employee with respect to compensation, duties, placement, location, promotion, or other material aspects of employment.

Again, there is no dispute that Heffner was a public servant and that he used the services of his administrative assistants for his own personal or business use. Assuming, as discussed above, that a case could be made that the services of the assistants constitute a thing of value, the question then becomes whether or not Heffner solicited or accepted these services in consideration of the assistants' continued employment. In other words, was there any evidence to suggest that

Heffner made it clear that doing this additional work for him was a condition of their continued employment?

The investigation revealed no evidence to suggest that Heffner conditioned the continued employment of the administrative assistants upon their willingness to do this additional, personal work. While the assistants stated during their interviews that they were concerned that if they declined to do the work there might be negative consequences -- simply by virtue of their subordinate position to Heffner and his ability to decide, as he took over first the Interim then the Superintendant positions, whether or not he would keep them as his assistant -- neither assistant indicated that Heffner actually conditioned their jobs upon doing this personal work. The inherent power imbalance between the position of Superintendant and administrative assistant is certainly of concern in analyzing whether or not an assistant would be free to say no -- however, for purposes of proving a violation of ORC 2921.43 it is not enough to simply demonstrate that a power imbalance exists -- the prosecution must prove that the thing of value was actually given in consideration for maintaining the assistant's position. Such evidence is lacking in this case. Further, ORC 2921.43 generally applies to quasi bribery situations. It applies when a public official maintains or appoints another for a public position and the public official accepts or solicits anything of value for maintaining or appointing the other person. Although Heffner did receive some help on personal matters, there is no evidence that he received this help as a condition of the employees maintaining their employment. In fact, as stated above, most of the personal assistance given was to avoid scheduling conflicts. For this reason, again, the Improper Compensation statute does not apply.

- **Theft in Office - Causing another state employee to work on Heffner's personal matters on state time.**

We also reviewed Heffner's use of ODE staff to work on personal matters as a potential Theft in Office violation. For the Theft in Office charge we must prove an underlying theft offense. One potential underlying charge for the offense was Unauthorized Use of Property (UUP), but this only applies to property owned by another. UUP does not cover unauthorized use of services, which includes labor. There also is a factual problem in that the investigation fails to establish a value for the amount of misuse, and for any theft offense, the amount must be established to a reasonable degree of certainty.

The other potential underlying charge we considered was simple Theft but it is likewise lacking in amount certainty. None of the interviews or evidence provided enough detail to deduce a specific amount of loss to ODE. While any amount of use of the services of state employees to perform personal tasks is inappropriate, in terms of proving an actual loss to ODE, the investigation shows only very minimal use of the staff for personal matters, some of which could be interpreted as job related in that it pertained to scheduling issues. Furthermore, when the actual statements of the employees were reviewed, we could find no assertion by them that their state paid time had been abused by Heffner for

personal purposes. As an aside, there is also no proof or even any allegation that any of the affected workers failed to complete their own work for the state.

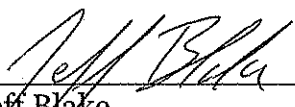
- **Theft in Office – Using state resources to work on Heffner's personal matters on state time.**

The other possible violation of the Theft in Office statute relates to the use of state equipment such as the fax machine, cell phone, and computer for personal use. We concentrated on personal use after finding no evidence in the information provided that Heffner did any ETS business related work for ETS during work hours. In looking at this possible violation, we took into account the ODE Human Resources Policies and Procedures Manual which allows for a limited amount of personal use of state equipment. The investigation showed three to four faxes, a small number of emails sent by computer or blackberry, and personal phone calls on the state issued blackberry. Many of the calls were of a short duration. Because of the minimal personal use allowance, the evidence is not sufficient to support a criminal charge of Theft in Office. The Policy Manual does allow for disciplinary action by ODE.

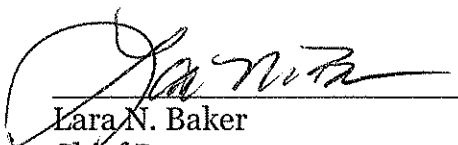
Conclusion

Based on all of the evidence presented to us for review, we agree with your finding that wrongful acts or omissions occurred, and that the facts do not arise to criminal violations. Therefore, we cannot pursue criminal charges. Please feel free to call either of us if you have any questions.

Sincerely,



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